May 4, 2006

The Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attention: Weighted Average Dumping Margin

Re: Request For Comments - Antidumping Proceedings: Calculation Of The Weighted Average Dumping Margin During An Antidumping Duty Investigation

Dear Secretary Spooner:

We submit these rebuttal comments on behalf of the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, the Free Trade Lumber Council, the British Columbia Lumber Trade Council and its constituent associations[1] and their companies (collectively "BCLTC"), the Québec Lumber Manufacturers Association, the Independent Lumber Remanufacturers Association, and the Canadian Lumber Remanufacturers Association in response to the Department of Commerce's ("the Department") *Federal Register* notice, dated March 6, 2006, requesting comments regarding the calculation of the weighted average dumping margin in an antidumping duty investigation. These comments are timely in accordance with the Department's *Federal Register* notice of April 25, 2006 (71 Fed. Reg. 23,898) extending the deadline for rebuttal comments to May 4, 2006. We are enclosing, pursuant to

[1] The Coast Forest Products Association (formerly known as Coast Forest & Lumber Association) and the Council of Forest Industries.

the Department's request, one original and six copies of this submission along with an electronic version in WordPerfect format on a CD-ROM.

Respectfully submitted,

Elliot J. Feldman
John J. Burke
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I. REBUTTAL OF COMMENTS FILED IN SUPPORT OF ZEROING UNDER THE AVERAGE-TO-AVERAGE COMPARISON METHODOLOGY

A. The Department Cannot Continue To Zero

Most of the comments submitted to the Department of Commerce on April 5, 2006 agree with, or at least accept, the Department's proposal to abandon zeroing in investigations using the average-to-average comparison methodology. However, several commenters urge the Department to continue to zero even when using that methodology.[1] The Department should reject those comments as aberrant and proceed with its stated intention to abandon zeroing in its average-to-average comparison methodology.

The WTO Panel in *United States – Zeroing*[2] found that the Department's use of zeroing in average-to-average comparisons is inconsistent with Article 2.4.2 of the WTO Antidumping Agreement ("AD Agreement").[3] The United States did not appeal that finding and, in choosing to not do so, has accepted it as final and binding.[4] Moreover, the WTO Appellate Body previously found the Department's use of zeroing in average-to-average comparisons to be inconsistent with Article 2.4.2. of the AD Agreement.[5] The United States did appeal on procedural grounds the finding of the

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[1] *See, e.g.,* Comments filed on behalf of the Coalition for Fair Lumber Imports (April 5, 2006), 2.

[2] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, circulated 31 Oct. 2005.

[3] Panel Report, *United States – Zeroing* at ¶ 7.32 ("In light of the foregoing considerations, the Panel finds that the United States has acted in breach of Article 2.4.2 of the AD Agreement when in the anti-dumping investigations at issue USDOC did not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.").

[4] *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 Apr. 2003, ¶ 92 ("{A}n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim.") (emphasis in original).

[5] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS/264/AB/R ¶108 (11 Aug. 2004) (*"Softwood Lumber")* ("{W}e have concluded, based on

(continued)
the ordinary meaning of Article 2.4.2 read in its context, that zeroing is prohibited when establishing the

WTO Panel in *United States – Zeroing* that the Department's zeroing methodology using the average-to-average method, as such, is inconsistent with Article 2.4.2 of the AD Agreement. The Appellate Body rejected the U.S. appeal and affirmed that zeroing as practiced by the Department in average-to-average comparisons is inconsistent with Article 2.4.2 as a general matter and not just as applied in particular cases.[6] Consequently, the Department is out of options. It must abandon zeroing.

The United States promised in its opening statement at the WTO Appellate Body oral hearing in *United States – Zeroing* "that it will soon be publicly announcing that it will no longer engage in zeroing when using the weighted-average-to-weighted-average methodology for purposes of calculating margins of dumping in original investigations."[7] The Department, therefore, consistent with the United States' promise, must eliminate zeroing in its average-to-average comparison methodology to bring the United States into compliance with its acknowledged obligations under the AD Agreement.

The Department should reject analogous comments urging it not to change its practice and give up zeroing on the grounds that the *United States - Zeroing* Report is as of yet un-adopted by the Dispute Settlement Body ("DSB").[8] Adoption by the DSB of the unappealed portion of the *United States - Zeroing* Report is now a mere formality, certain to occur in due course, particularly now that the Appellate Body has affirmed the Panel's finding that zeroing in average-to-average comparisons, as such, is inconsistent with the AD Agreement. Moreover, the Appellate Body Report in *United*

existence of margins of dumping under the weighted-average-to-weighted-average methodology.").

[6] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (18 April 2006) ("*United States – Zeroing II*") ¶ 222.

[7] *United States – Zeroing II* at ¶ 201.

[8] *See* Comments filed on behalf of Stewart and Stewart (April 5, 2006), 3.

States – Softwood Lumber, which reached the same conclusion, already has been adopted by the DSB.

One commenter contends that zeroing in the average-to-average comparison methodology is required by statute.[9] The U.S. Court of Appeals for the Federal Circuit has held, to the contrary, that zeroing is not required by statute: "{W}e are reluctant to find these dictionary definitions so clear as to compel a finding that Congress expressly intended to require zeroing. Even using the above 'greater than' definitions, the statute does not plainly require consideration of only those dumping margins with a positive value."[10] The Department, as well, has acknowledged publicly that zeroing is not mandated by statute: "{t}he U.S. Court of Appeals for the Federal Circuit twice has held that the Tariff Act — including these two sections in particular — does not require the use of zeroing."[11]

One commenter contends that zeroing "affects the remedial purpose of the statute."[12] Zeroing does "affect" the remedial purpose of the statute, but negatively, artificially inflating margins, making the statute punitive, not remedial.

It is well settled that U.S. antidumping duty laws are remedial.[13] Zeroing, as noted by the WTO Appellate Body, distorts both the calculation of dumping margins and findings of whether dumping has occurred:

> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed* Linen to calculate a dumping margin,

[9] *See* Comments filed on behalf of Collier Shannon Scott (April 5, 2006), 2.

[10] *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004).

[11] *See* Executive Summary of the First Written Submission of the United States, dated Feb. 10, 2005, *United States—Zeroing*, ¶ 39.

[12] *See* Comments filed on behalf of the Coalition for Fair Lumber Imports (April 5, 2006), 2.

[13] *See*, *e.g.*, *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990) (citing cases)) ("As this court has stated, the antidumping duty laws are remedial not punitive.").

> whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[14]

Because zeroing is inherently biased not only towards inflating dumping margins, but also towards creating dumping margins where they otherwise would not exist, its effect is punitive, not remedial. Therefore, to be consistent with the remedial purpose of the statute, the Department should abandon zeroing under all calculation methodologies in all proceedings.

B. The Department Must Cease Zeroing Now

Contentions that the Department should defer changes to the average-to-average comparison methodology until issuance of the Appellate Body Report in *United States - Zeroing*[15] are now moot, as the Appellate Body has issued its Report. Although the portion of the Panel's Report at issue in these section 123 proceedings was not appealed, the WTO Appellate Body in its Report affirmed the Panel's finding that zeroing, as such, is prohibited in average-to-average comparisons.[16]

[14] Appellate Body Report, *United States – Sunset Review Of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R, adopted 9 Jan. 2004 ("*Corrosion-Resistant Carbon Steel*"), ¶ 135.

[15] *See* Comments filed on behalf of the Consuming Industries Trade Action Coalition (April 5, 2006), 10.

[16] *United States – Zeroing II*, ¶ 222.

One commenter, in urging the Department to continue zeroing, contends that "the 'appropriate forum' for negotiating {a change to the Department's zeroing practice} is the Doha Round Rules Negotiations."[17] The present section 123 proceeding is not a negotiation, so the commenter's reference to "appropriate forums" is off the mark. The United States' obligation, which it has acknowledged by initiating this very proceeding, is to come into compliance with the existing AD Agreement. That obligation applies now, and cannot be deferred with the hope of avoidance altogether in some future agreement.[18]

One commenter urges the Department to continue zeroing because the Department has zeroed for "as long as anyone can presently recall."[19] This comment is an example of *argumentum ad antiquitam*, a logical fallacy of distraction. That something has been done for years is not a reason to continue doing it. Were it otherwise, this type of "appeal to age" would have most people still believing that the world is flat, and the United States might still be allowing only white males of a certain age and wealth the right to vote.

One commenter argues that, were the Department to abandon zeroing, congressional intent to achieve different results under the targeted dumping provision (19 U.S.C. § 1677f-1(d)) would be nullified, because without zeroing the transaction-to-average methodology provided for targeted dumping would yield results that are mathematically equivalent to the results yielded by the average-to-average

[17] *See* Comments filed on behalf of Stewart and Stewart (April 5, 2006), 3-4.

[18] The "sense of the Senate," with respect to agreements or protocols resulting from future trade negotiations, set forth in the Craig-Rockefeller Amendment, is similarly inappropriate to reference in the present section 123 proceeding because the Department must comply with current agreements, not aspirations for new ones.

[19] *See* Comments filed on behalf of Stewart and Stewart (April 5, 2006), 7.

methodology.[20]

The Department neither invited nor requested comments on targeted dumping. Thus, the Department should dismiss the commenter's targeted dumping argument as irrelevant. Even were targeted dumping relevant to this section 123 proceeding, the mathematical equivalency argument is flawed for at least three reasons.[21]

First, the WTO Appellate Body already has rejected arguments, based on the targeted dumping provision, that zeroing must be upheld in investigations.[22] Second, the statutory criteria for applying the targeted dumping provision will rarely be fulfilled, as evidenced by the lack of even a single targeted dumping investigation in the eleven years that the provision has been in effect. Hypothetical concerns about the possible impact on a methodology that has never been used cannot justify continuing to zero after zeroing has been found to be inconsistent with the AD Agreement.

Third, the targeted dumping provision is a tool for locating and addressing targeted dumping that does not require zeroing to accomplish its purpose. For example, assuming the statutory prerequisites are met, the Department could use the transaction-to-average comparison methodology to locate the particular class of transactions for which targeted dumping is taking place. Zeroing would not be needed. Nor would zeroing be necessary, or even effective, to remedy the targeted dumping.

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[20] *See* Comments filed on behalf of the Committee to Support U.S. Trade Laws (April 5, 2006), 12. At least one commenter contends that the Department should propose and issue regulations that address targeted dumping. *See* Comments filed on behalf of Stewart and Stewart (April 5, 2006), 17. This contention is beyond the scope of the comments requested.

[21] One lone WTO panelist pursued this issue in the Article 21.5 proceeding in *Softwood Lumber*. However, that panelist's views are contrary to several WTO Appellate Body rulings on zeroing and cannot provide a basis for disregarding U.S. obligations under Article 2.4.2 of the AD Agreement to abandon zeroing.

[22] See Appellate Body Report, *Softwood Lumber* ¶¶ 104-05.

Several commenters argue that the Department should provide an opportunity for public comment after it has proposed a specific replacement methodology and prior to adopting a final rule.[23] However, in order to comply with the WTO Panel Report in *United States - Zeroing*, the Department must abandon its practice of zeroing, nothing more. It, therefore, does not need to propose a replacement methodology nor adopt a final rule. The Department's *Federal Register* notice of March 6, 2006 announcing its proposal to abandon zeroing in average-to-average comparisons and providing this opportunity to comment, satisfies all of the procedural tasks under both section 123 and the Administrative Procedures Act ("APA") required to abandon zeroing.

II. REBUTTAL OF COMMENTS URGING THE DEPARTMENT TO SWITCH TO THE TRANSACTION-TO-TRANSACTION METHODOLOGY, INCLUDING ZEROING UNDER THAT METHODOLOGY

Zeroing is not a formal practice. It is not the product of rule-making; it is not inscribed in the Department's Manual nor enshrined in its Regulations. As it exists only informally, nothing elaborate is required to abolish it. A change in comparison methodology, however, is a different matter.

Should the Department take any action beyond its proposal to abandon zeroing, it would have to do so in accordance with proper rule-making requirements under the APA. For example, should the Department seek to modify the preference in its regulations for the average-to-average comparison methodology, it would have to comply with all applicable APA requirements, including publication of the proposed new comparison methodology in the *Federal Register*, and allowing parties to comment before making a final change to the rule.[24] Such a change, however, even if the Department were so inclined, would run afoul of prohibitions on zeroing in the transaction-to-transaction methodology under international rules.

A. The Department May Not Switch Its Preferred Methodology To Transaction-To-Transaction Comparisons

Several commenters urge the Department to try to evade the WTO rulings that zeroing is prohibited in average-to-average comparisons by switching to transaction-to-transaction comparisons in all investigations, and then to continue to

[23] *See, e.g.,* Comments filed on behalf of Dofasco Inc. (April 5, 2006), 2.

[24] Modifying the regulations would not be sufficient in that case, because as discussed below, Congress has embedded the preference for average-to-average comparisons into the statute.

zero.[25] The Department must reject those comments because U.S. law permits transaction-to-transaction comparisons only in very rare circumstances involving very few sales and identical or very similar merchandise sold in each market. According to the Statement of Administrative Action ("SAA") to the Uruguay Round Agreements Act ("URAA"):

> Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices. . . . Such a methodology {transaction-to-transaction} would be appropriate in situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made.[26]

Congress explicitly approved the SAA in Section 101(a) of the URAA, and provided in Section 102(d) of the URAA that the SAA is the authoritative expression of the United States concerning the interpretation and application of the URAA.[27] The Department, therefore, may not disregard the SAA, nor its requirements.

One of the commenters urging a switch to transaction-to-transaction comparisons as the preferred methodology for investigations acknowledged that its proposal would require the Department to amend Section 351.414(c) of its regulations,[28] which provides that:

> In an investigation, the Secretary normally will use the average-to-average method. The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.[29]

The regulation, consistent with the SAA, establishes a strong preference for the average-to-average method that can be overcome only in unusual circumstances, where the prerequisites of few sales and identical or very similar merchandise are met.

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[25] *See* Comments filed on behalf of the Coalition for Fair Lumber Imports (April 5, 2006), 2.

[26] SAA at 4178.

[27] *See* 19 U.S.C. §§ 3511(a) and 3512(d).

[28] *See* Comments filed on behalf of the Coalition for Fair Lumber Imports (April 5, 2006), 5 n. 14.

[29] 19 C.F.R. § 351.414(c).

These prerequisites cannot be met in most cases, which typically involve thousands of transactions and many different products.

The Department implemented its regulation mandating a weight-averaging methodology in most instances through a formal rule-making process. The regulation remains binding upon the Department until and unless it is amended,[30] which the Department may do only through a formal rule-making process satisfying all APA requirements.[31] Therefore, the Department may use the transaction-to-transaction method only in unusual cases involving very few sales, and where the merchandise is identical or very similar.

The transaction-to-transaction methodology raises questions about how to match transactions; about adjustments that may need to be made to ensure fair comparisons; and the ramifications for other aspects of the Department's calculations. The interaction of cascading changes, and the techniques required to control them, are unknown and unexamined. They prove with evidence what the law already had concluded: the transaction-to-transaction methodology cannot be used in all but the very rare cases for which it was designed.

B. The Department May Not Zero In Transaction-To-Transaction Comparisons

Several commenters contend that zeroing is permitted in the transaction-to-transaction comparison methodology.[32] The WTO Appellate Body has issued several

[30] *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,295 (May 19, 1997) (revising AD/CVD rules to conform to URAA after notice and comment period).

[31] 5 U.S.C. § 553 (establishing procedures for notice and comment rule-making).

[32] *See, e.g.,* Comments filed on behalf of the Coalition for Fair Lumber Imports (April 5, 2006), 5. One commenter argues that 19 U.S.C. § 1677(35)(A) requires that non-dumped sales be excluded from the dumping margin, and therefore zeroing in the transaction-to-transaction comparison methodology is required. *See* Comments filed on behalf of the Committee on Pipe and Tube Imports (April 5, 2006), 10. The courts have rejected definitively the argument that 19 U.S.C. § 1677(35)(A) requires zeroing. *See Corus Staal BV v. Dep't of Commerce*, 259 F.Supp.2d 1253, 1261-63 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005) ("sections 1677(35)(A) & (B) neither require nor prohibit Commerce from considering nondumped sales . . .").

rulings, however, that have found zeroing inconsistent with Article 2.4.2 of the AD Agreement.[33] The reasoning of those rulings applies to zeroing in transaction-to-transaction comparisons as it does in average-to-average comparison methodology.

The Department attempted to evade the Appellate Body's ruling in *Softwood Lumber* by switching to the transaction-to-transaction methodology and continuing to zero.[34] However, the Appellate Body's rulings -- that the Department's use of zeroing in the average-to-average method in investigations and the transaction-to-average method in reviews is inconsistent with the AD Agreement -- were based upon its findings, in both cases, that "'margins of dumping' can be found only for the product under investigation as a whole."[35] The Appellate Body based its findings, that "margin(s) of dumping" must be found for the product as a whole, on the definition of dumping in Article 2.1 of the AD Agreement, which it explained applies to the entire agreement.[36] It then applied those findings to the phrase "margin of dumping" in Article 9.3 to conclude that the Department's use of zeroing in administrative reviews is inconsistent with Article 9.3 of the AD Agreement.[37] Now that the Appellate Body has confirmed that the term "margins of dumping" must be given the same meaning in Article 9.3 as in the first sentence of Article 2.4.2, there can no longer be any doubt that it must be given the same meaning for both methodologies provided for under the first sentence of Article 2.4.2.

The term "margins of dumping" as used in Article 2.4.2 does not distinguish between average price comparisons and transaction-to-transaction comparisons.[38] The Department, the Appellate Body found, was not in compliance with the AD Agreement, and as long as it zeroes it will remain out of compliance, whether it utilizes average-to-average comparisons, transaction-to-average comparisons, or transaction-to-transaction comparisons.

Several commenters claim that zeroing in transaction-to-transaction comparisons is consistent with the WTO AD Agreement, relying on the recent Article 21.5 Panel Report in *Softwood Lumber*.[39] That unadopted Report,[40] however, directly

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[33] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 Mar. 2001, ¶ 86 ("*EC-Bed Linen*"); Appellate Body Report *Lumber* at ¶ 183; United States – Zeroing II at ¶ 222.

[34] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22,636, 22,637-39 (May 2, 2005).

[35] Appellate Body Report *Softwood Lumber* at ¶ 96; United States – Zeroing II at ¶¶ 126-27 and 133. Although the Appellate Body noted in both cases that it was not addressing zeroing in transaction-to-transaction comparisons, the logic of its rationale inescapably leads to the conclusion that zeroing in transaction-to-transaction comparisons is inconsistent with Article 2.4.2 of the AD Agreement.

[36] *See United States – Zeroing II* at ¶¶ 124-25.

[37] *United States – Zeroing II* at 126-27 and 133.

[38] The first sentence of Article 2.4.2 states that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." AD Agreement Article 2.4.2.

[39] *See* Comments filed on behalf of the Committee on Pipe and Tube Imports (April 5, 2006), 11-12, *and* comments filed on behalf of the Coalition for Fair Lumber Imports (April 5, 2006), 5.

[40] *United States - Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article*

contradicts the rationale of the adopted Appellate Body Report in *Softwood Lumber* that zeroing is contrary to the first sentence of Article 2.4.2 because it fails to calculate a single margin of dumping for the product as a whole.[41] The relevant language in the first sentence of Article 2.4.2 that the Appellate Body was interpreting applies equally to transaction-to-transaction comparisons. There can be no distinction and the Article 21.5 Panel Report failed to make any distinction. That unadopted Panel Report cannot be used to trump the clear logic of an adopted Appellate Body Report.[42]

[41] 21.5 of the DSU by Canada, WT/DS264/RW (3 April 2006) Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/RW, ¶ 99. Further, the Appellate Body in *Softwood Lumber* upheld the finding of the WTO Panel that the United States' practice of zeroing is inconsistent with the AD Agreement. Therefore, the views expressed by that Panel also were adopted by the DSB and are instructive on the zeroing issue. That Panel stated that zeroing in the transaction-to-transaction methodology would violate the WTO:

> Although we are mindful that we are not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies, we are of the view that the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*.

Panel Report, *United States- Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted as modified by the Appellate Body on 31 April 2004, ¶ 7.219, n.361.

[42] This issue will be addressed directly by the Appellate Body in the next few months. The Panel formed to review the Department's section 129 determination in *Softwood Lumber* found that zeroing was permissible under a transaction-to-transaction comparison, contrary to the Appellate Body's findings and reasoning. Canada already has stated publicly that the Panel's finding is inconsistent with the Appellate Body's decisions and we fully expect Canada to appeal that finding. The Appellate Body already has

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analyzed the key language in Article 2.4.2 that applies equally to transaction-to-transaction and average-to-average comparisons and found that language prohibits zeroing. Thus, the Panel finding on zeroing in transaction-to-transaction comparisons is unlikely ever to have any legal effect. Regardless, the Department should not rely on it unless it becomes final and, like the Appellate Body decisions cited above, is adopted by the DSB.

C. The Department Should Reject Proposals For Transaction Matching In Transaction-To-Transaction Comparisons

Two commenters have proposed several modified versions of the transaction-to-transaction methodology that they claim would resolve the problem of how to match transactions.[43] None of those suggestions, however, resolves the transaction matching problem. Instead, the proposals demonstrate why the transaction-to-transaction methodology should never be used outside the unusual cases described in the SAA and the Department's regulations.

Stewart & Stewart suggested the following methodologies for matching transactions: (a) random selection, (b) the *Softwood Lumber* approach, (c) choosing as representative the highest priced sale, and (d) choosing as representative an average priced sale.[44] Randomly selecting one home market sale from the group of eligible home market sales, by definition, would lead to random results. Random results cannot satisfy consistently "the basic purpose of the statute: determining current margins as accurately as possible."[45] Nor would randomly selecting a sale comply with fundamental principles of administrative law. Such an approach would raise serious concerns over whether the Department's methodology was transparent and reasoned, or merely arbitrary.[46] These problems are equally applicable to the *Softwood Lumber* approach, as it, too, ultimately relies on random sales as a tie-breaker.

Choosing, as a representative sale, the sale with the highest price from the group of equally comparable home market sales would distort the dumping margin by skewing the calculation towards finding dumping. This approach would violate the evenhandedness requirements of the AD Agreement. The Department's discretion "must be exercised in an *even handed* way that is fair to all parties affected by an anti-dumping investigation."[47] Choosing a methodology that deliberately skews the results towards a dumping finding, such as the one proposed by Stewart & Stewart, would not pass muster under the AD Agreement because it would not be even handed and would be designed to make an unfair comparison.

Choosing, as a representative sale, the sale closest in price to the mean or median price would distort the results less than choosing the highest price from the group. Nevertheless, this approach must also be rejected because it is equivalent to making a transaction-to-average comparison, prohibited in investigations unless the statutory prerequisites for the targeted dumping methodology apply.[48] It also fails to

[43] *See* Comments filed on behalf of Stewart and Stewart (April 5, 2006), 11-17; Comments filed on behalf of the Committee on Pipe and Tube Imports (April 5, 2005), 4.

[44] *See* Comments filed on behalf of Stewart and Stewart (April 5, 2006), 11-17.

[45] *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

[46] *See, e.g., Pohang Iron & Steel Co. v. United States*, 23 C.I.T. 778, 791, 1999 WL 970743 12 (Ct. Int'l Trade 1999) ("The application of any new standard must be transparent. Exactly what factors are now discounted and why, must be explained. As the court has stated previously, some clear standards are needed. Otherwise agency decision making may descend into arbitrariness.") (citations omitted).

[47] Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, (July 24, 2002) ("*Hot-Rolled Steel*"), ¶ 148 (emphasis in original).

[48] *See* 19 U.S.C. § 1677f-1(d)(1). In order to determine the sales closest to the "mean" the Department would need to first calculate the average Normal Value and then use as a proxy for that average Normal Value the sale closest to it. The Department may not evade its statutory obligations by using a proxy for

solve the basic problems inherent in applying the transaction-to-transaction comparison methodology discussed above and in greater detail in our comments filed on April 5, 2006.[49]

Schagrin Associates proposes that the Department should compare each U.S. sale to each home market sale in each CONNUM, disregard each comparison where the price of the U.S. sale is higher, and then weight average all the remaining U.S. sales.[50] This proposed methodology suffers from the same problems as those discussed directly above: it violates Articles 2.4 and 2.4.2 of the AD Agreement, and because of the averaging, it is functionally equivalent to the transaction-to-average methodology, which can be used in investigations only when the prerequisites for a targeted dumping analysis have been met. For these reasons alone, the proposed methodology cannot be adopted.

Schagrin Associates' proposed methodology also is unadministrable. It would increase vastly the number of comparisons. In the *Softwood Lumber* case, for example, many of the respondents had over 100,000 U.S. sales and an equal number of home market sales. Were this proposed method used in *Softwood Lumber,* it would require, at a minimum, tens of millions of comparisons for each respondent. Depending upon the number of CONNUMS and similar product matches, the numbers of comparisons required by the Schagrin method could rise into the billions.

[49] See Comments filed on behalf of the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, the Free Trade Lumber Council, the British Columbia Lumber Trade Council, the Québec Lumber Manufacturers Association, the Independent Lumber Remanufacturers Association, and the Canadian Lumber Remanufacturers Association (April 5, 2005), 8-12.

[50] *See* Comments filed on behalf of the Committee on Pipe and Tube Imports (April 5, 2005), 4.

III. REBUTTAL OF COMMENTS REGARDING ZEROING IN ADMINISTRATIVE REVIEWS

At least one commenter urges the Department to not abandon zeroing in administrative reviews because zeroing in administrative reviews has been upheld by both a WTO panel and the U.S. Court of Appeals for the Federal Circuit.[51] The WTO Appellate Body, however, has now reversed the WTO panel report upon which the commenter was relying on exactly this issue. The Appellate Body found in *United States – Zeroing II* that the Department's use of zeroing in administrative reviews is inconsistent with Article 9.3 of the AD Agreement.[52] Although the Appellate Body declined to make an "as such" finding for procedural reasons, its rationale condemns zeroing in all administrative reviews, not only the specific reviews for which it made its "as applied" finding.

The Appellate Body, using Article 2.1 of the AD Agreement as the essential context, found that "margin of dumping" as used in Article 9.3 of the AD Agreement must be established for the "product as a whole."[53] It then found the following with respect to the Department's use of zeroing in the administrative reviews at issue:

> Furthermore, we recall that, in the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison. Because results of this type were systematically disregarded, the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. [54]

The Department uses this same methodology, now struck down by the Appellate Body, to zero in every administrative review. The Appellate Body's rationale would apply

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[51] *See* Comments filed on behalf of Florida Citrus Mutual of Lakeland, Florida (April 5, 2006), 2-3.

[52] *United States – Zeroing II* at ¶ 135 ("we *reverse* the Panel's finding . . . that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in the administrative reviews at issue, and find, instead, that the United States acted inconsistently with those provisions.") (emphasis in original).

[53] *United States – Zeroing II* at ¶¶ 124-26.

[54] *United States – Zeroing II* at ¶ 133.

equally to every one of those reviews. Therefore, the inescapable conclusion is that, in order to bring the United States into compliance with its obligations under Article 9.3 of the AD Agreement, the Department must abandon zeroing in all administrative reviews.

U.S. courts repeatedly have found that zeroing is not required under the Tariff Act, including in administrative reviews.[55] There is, therefore, no impediment in U.S. law that would prevent the Department from complying with its obligations to abandon zeroing in administrative reviews, consistent with the findings of the WTO Appellate Body in *United States – Zeroing II*.

One commenter proposes that, should the Department abandon zeroing in administrative reviews, it should do so only for reviews of investigations initiated after any change in policy has taken effect.[56] This theory is that a burglary should not be interrupted by the police when the law has criminalized the action only during its commission. From the moment an international obligation becomes clear, which is surely now, the Department must abandon a method that contravenes international obligations -- zeroing under all methodologies and in all proceedings. When it does so, it should do so for all reviews, including reviews of pre-existing orders, consistent with its prior practice.[57]

IV. MISCELLANEOUS COMMENTS

The Submitting Parties support comments filed by others urging the Department to apply any new methodology to all dumping proceedings where the Department's determination is not yet final,[58] to eliminate zeroing in any pending

[55] *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004).

[56] *See* Comments filed on behalf of Florida Citrus Mutual of Lakeland, Florida (April 5, 2006), 4.

[57] *See, e.g., Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186, 69,196-97 (Nov. 15, 2002).

[58] *See* Comments filed on behalf of the Department of Foreign Trade, Ministry of Commerce, Royal Thai Government (April 5, 2006), 11-12.

remand determination for orders imposed subsequent to enactment of the URAA[59] and, in making determinations in sunset reviews, to cease referring to margins calculated in the investigation using zeroing in the average-to-average comparison methodology.[60] In addition to the reasons offered in support of the comments themselves, the Submitting Parties call to the Department's attention section 123(g)(2), 19 U.S.C. § 3533(g), which, as the Department has acknowledged:

> provides for {but} a single limitation on the effective date {of the new methodology}: "the final rule or other modification may not go into effect before the end of the 60-day period beginning on the date on which consultations [with the appropriate congressional committees on the proposed content of the modification] begin [unless the President determines that an earlier effective date is in the national interest]."[61]

The Department, therefore, would be unencumbered by the statute were it to decide to extend application of a new methodology to proceedings that would not normally be eligible under its established practice.

[59] *See* Comments filed on behalf of the Japan Iron & Steel Federation (April 5, 2006), 12.

[60] *See* Comments filed on behalf of the Japan Bearing Industrial Association (April 5, 2006), 4.

[61] *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 221, 69,186, 69,196 (Nov. 15, 2002) (brackets in original; braces added).